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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO. 628

THOMAS D. MOORMAN, Administrator of the Estate of Helen Mar Hunnicutt, deceased, et al.,
Petitioners

v.

THE AUSTIN PRESBYTERIAN THEOLOGICAL SEMINARY, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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Petitioners, Thomas D. Moorman, Administrator of the Estate of Helen Mar Hunnicutt, deceased, and the other persons claiming under the said deceased, as appear of record herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Texas, and the denial of petitioners' motion for rehearing, dated July 7, 1965.

OPINIONS BELOW

The opinion of the Supreme Court of Texas has not yet been reported and is printed herein in Appendix A. The original opinion of the court of May 19, 1965, reversing the opinion of the Court of Civil Appeals (for the Third Supreme Judicial District of Texas, at Austin) is printed at pp. 13-22, *infra;* and the judgment overruling petitioners' motion for rehearing is printed at p. 23, *infra.*

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, is printed at pp. 23-43, *infra;* and it is reported as *Thomas D. Moorman, Adm., etc., et al. v. Austin National Bank, Independent Executor, etc., et al., 381 S.W.2d 408.*

JURISDICTION

The judgment of The Supreme Court of Texas was entered May 19th, 1965. Petitioners' motion for rehearing was overruled July 7, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

QUESTION PRESENTED

Whether the action of the Supreme Court of Texas denied petitioners equal protection of the laws and due process of law, by reversing and rendering this cause, and in refusing to remand the case either to the Court of Civil Appeals, or to the trial court, for a new trial or for determination of the issue as to the "sufficiency of the evidence" to support, and the "overwhelming weight of the testimony" against, the jury verdict; in view of the finding of the Court of Civil Appeals that there was no evidence to support the verdict, and in view of the Texas rule that a finding by the Court of Civil Appeals of "no evidence" includes the lesser

finding that the evidence was insufficient to support the verdict, and that the verdict was against the "overwhelming weight of the testimony".

STATUTES INVOLVED

The statutes involved are the Constitution of Texas, Article 5, Sec. 6; Rule 418, Texas Rules of Civil Procedure; and the Equal Protection and Due Process Clause of the Fourteenth Amendment of the United States Constitution. The pertinent provisions of the Texas Constitution and the Texas Rule of Civil Procedure are set out in Appendix B.

STATEMENT OF THE CASE

The Supreme Court of Texas entered an order in this case directing the Clerk of that Court to deliver the Original Papers, transcript, statement of facts, and exhibits in this case, and copies of the proceedings in that Court, to petitioners to be filed as the Record in the Supreme Court.

The Record consists of Items 1-23, as designated by the Clerk's Certificate dated August 30, 1965, including also the transcript, statement of facts, and volume of exhibits (included in Item 12).

This was a suit by the Austin National Bank as independent executor of the estate of H. P. Hunnicutt, deceased, to determine whether Helen Mar Hunnicutt, whom H. P. Hunnicutt in his will described as "my adopted daughter",[1] during her lifetime had exercised

[1]Actually H. P. Hunnicutt was not the legally adopted parent of Helen Mar Hunnicutt. See, *Moorman v. Hunnicutt, (Tex. Ct. of Civ. App.) 325 S.W.2d 941, writ of error refused by Tex. Sup. Ct., no reversible error.* Helen Mar Hunnicutt was the sister of petitioner Moorman, and the niece of Mrs. H. P. Hunnicutt, deceased, from whom Helen Mar received by devise the South 1000 acres of a 2000 acre tract, and from whom H. P. Hunnicutt received the North 1000 acres involved in this option suit.

a testamentary option given in his will to purchase 1000 acres of land in Dimmit County, Texas (Item 5, and proviso thereto; Court of Civil Appeals opinion, Appendix A, pp. 25-27).

The trial court, on the verdict of a jury, rendered judgment that Helen Mar Hunnicutt, under whom petitioners claim their rights, before her death had not elected to exercise the option extended to her in the will of H. P. Hunnicutt (Appendix A, opinion of the Court of Civil Appeals, p. 28, *infra*).

The Court of Civil Appeals reversed and rendered the trial court's judgment in favor of petitioners upon two grounds, that petitioners were entitled to judgment because (1) there was "no evidence" to support the jury verdict; and (2) the evidence was "insufficient to support the jury verdict", and the jury verdict was against the overwhelming weight of the evidence (Appendix A, Court of Civil Appeal's opinion, p. 35, *infra*).

The Supreme Court of Texas reversed the Court of Civil Appeals, and affirmed the judgment of the trial court, (Appendix A, p. 22, *infra*). The Supreme Court did not hold that upon the undisputed evidence, as a matter of law, Helen Mar Hunnicutt during her lifetime did not exercise the option.

The Supreme Court in its opinion said:

"They (petitioners here; respondents there) had no point there (in the Court of Civil Appeals) invoking the jurisdiction of the intermediate Court to determine whether the finding of the jury is contrary to the overwhelming weight and preponderance of the evidence. The judgment of the Court of Appeals is accordingly reversed, and that of the trial court is affirmed." (Appendix A, p. 22, *infra*).

The petitioners (appellants in the Court of Civil Appeals) presented the following in Points of Error, upon which they predicated their appeal; both of which were sustained by the Court of Civil Appeals:

"First Point: There is no evidence to support the verdict of the jury and judgment of the Court; and the undisputed evidence shows that Helen Mar Hunnicutt during her lifetime elected to exercise the option extended to her in the Will of Hicklin P. Hunnicutt, deceased; and the trial court should have sustained defendant's Motion for Instructed Verdict; and Motion Notwithstanding the Verdict."

"Second Point: The trial court should have granted appellants' Motion for Judgment, notwithstanding the verdict, upon the following grounds:

"1. . . .

"2. The evidence is insufficient to support the verdict of the jury and the judgment of the court.

"3. . . .

"4. The Court erred in overruling the Motion for Judgment notwithstanding the verdict, filed by these defendants and cross-plaintiffs above, which Motion was filed upon the following grounds:

"1. . . .

"2. The overwhelming weight of the evidence establishes that Helen Mar Hunnicutt during her lifetime, when the option was extended to her by H. P. Hunnicutt's executor, elected to accept the option tendered in the will." (Petitioners' Brief in the Court of Civil Appeals, Document (13) in Record, p. 9-10; Appendix C, pp. 52-53, *infra*).

Petitioners had an assignment of error in the Court

of Civil Appeals to the effect that the trial court should have granted a new trial because the evidence was "insufficient to support the verdict of the jury" (Appendix C, pp. 52-53, *infra*).

The Court of Civil Appeals sustained petitioners' (appellants') "first two points"; the first point on "no evidence"; the second point on "insufficiency of the evidence" and "overwhelming weight of the evidence" (Appendix A, opinion of the Court of Civil Appeals, p. 35, *infra*).

The Supreme Court of Texas treated the record as reflecting that petitioners did not present to the Court of Civil Appeals, and the Court of Civil Appeals did not consider, the issue of "insufficient evidence" and "overwhelming weight of the evidence", and refused to give the intermediate court the opportunity of passing on this question.

Petitioners presented their federal question of equal protection of the laws by motion for Rehearing in the Supreme Court; the point not arising until the opinion of the Supreme Court was rendered (Motion for Rehearing in the Supreme Court, Instrument (8)).

All the material evidence in the case is found in full in the opinion of the Court of Civil Appeals, Appendix A, pp. 23-43, *infra*.

REASONS FOR GRANTING THE WRIT

THE DENIAL BY THE SUPREME COURT OF TEXAS OF AN OPPORTUNITY FOR THE DETERMINATION BY THE COURT OF CIVIL APPEALS OF THE ISSUE OF THE "INSUFFICIENCY OF THE EVIDENCE" AND THE "OVERWHELMING WEIGHT OF THE TESTI-

MONY" IN THIS CASE IS BASED UPON A FALSE, UNREASONABLE, DISCRIMINATORY, AND ARBITRARY TREATMENT OF THE RECORD.

Every litigant in a state court asserting a vested right (i.e. a matured right to purchase growing out of an election to accept a testamentary option) is entitled to a reasonable and fair and non-discriminatory determination of such right.

Under the *Constitution of Texas, Art. 5, Sec. 6,* the decisions of the Texas intermediate courts of civil appeals are "conclusive on all questions of fact brought before them on appeal".

If upon appeal the Court of Civil Appeals holds that the evidence is insufficient or contrary to the overwhelming weight of the testimony, the Supreme Court of Texas may not review that finding, and is without jurisdiction to reverse such finding. See, *Barker v. Coastal Builders, Inc. (Tex. Sup.) 271 S.W.2d 798, 807.* The point that the verdict of the jury was "against the overwhelming weight of the evidence" "presents a question of fact", and the Supreme Court "is without jurisdiction to decide it". "The finding by the Court of Civil Appeals that there was no evidence warranting the submission of" a special issue, "includes the finding that the answer of the jury thereto was against the overwhelming preponderance of the evidence, *or, as frequently stated, that the evidence was insufficient to support the finding"* (Emphasis added).

In petitioners' case the determination by the Court of Civil Appeals that there was "no evidence" to support the jury's verdict on the issue as to the acceptance of the option, included the lesser finding that the evidence was insufficient to support the verdict. The terms

"insufficiency of the evidence", and "against the overwhelming preponderance of the evidence" are synonymous. See, *Barker v. Coastal Builders, Inc., per curiam opinion, 271 S.W.2d, at p. 808.*

Certainly, if the Court of Civil Appeals' finding of "no evidence" to support the verdict includes a finding of "insufficient evidence" to support the verdict, then the appellants' point upon appeal that there was "no evidence" to support the verdict would include the contention that the evidence was "insufficient to support the verdict". To hold otherwise is senseless, "inconsistent", and wholly arbitrary and unreasonable.

No prayer for relief is required in the brief in the court of civil appeals under *Tex. Court Rule 418,* and a contention by an appellant that the appellate court should reverse and render the case because there is "no evidence" necessarily includes the contention that the case should be reversed and rendered, or reversed and remanded, for "insufficient evidence", depending upon whether or not all possible evidence in the case has been developed. See, *Davis v. Gale, (Tex. Sup.) 330 S.W.2d 610.* In these petitioners' case if it appears that there could not possibly be any other evidence, and if the Court of Civil Appeals so found, then that intermediate court should, as petitioners contended, have reversed the case and rendered judgment for petitioners, because of insufficient evidence to support a verdict and judgment for the appellees, and because it appeared sufficient evidence could not be presented.

Certainly it may not be reasonably said that petitioner, by contending that judgment should be rendered in his favor, waived his assignment of error that the evidence was insufficient to support that judgment of the trial court.

Chief Justice Calvert, joined by two other members of the Court, in his procedural dissent, in *Barker* (271 S.W.2d, at pp. 808-9), points out this "wholly inconsistent and anomalous position" in which the Supreme Court of Texas has placed itself. As he points out the Court has "held consistently, that a point of error that there is 'no evidence' to support a jury verdict or trial court judgment does not and cannot 'include' a contention that the evidence is 'insufficient' to support the verdict or judgment"; and yet the Court has "held that a *ruling* on a 'no evidence' point can and does 'include' a *ruling* on an 'insufficient evidence' point". "Moreover, it is well established that a question of 'no evidence' is a law question and a question of 'insufficient evidence' is a fact question".

"The effect of the cited cases", Chief Justice Calvert says, "is that when a Court of Civil Appeals has decided only a law question we will presume that it also decided a fact."

How it may be presumed that a Court of Civil Appeals in finding "no evidence" included a finding of "insufficient evidence", if an appellants' point presenting "no evidence" does not also present "insufficient evidence", no one has ever been able to explain.

The adoption by the Supreme Court of Texas of such an "anomalous" and "inconsistent" reasoning and rule lacks substance, and is arbitrary and capricious. Particularly is this true when petitioners (appellants) in the trial court in this case by amended motion for new trial urged an assignment of error "that the (trial) Court grant a new trial herein upon the following grounds, to wit:

"1. There is no evidence to support the verdict of the jury and the judgment of the Court."

"2. The evidence is insufficient to support the verdict of the jury";

and asked for a new trial, specifically setting out how the evidence was insufficient, and how the verdict was contrary to the overwhelming weight of the evidence (Appendix C, pp. 49-52, *infra*).

In briefing in the Texas Courts of Civil Appeals, under *Rule 418,* the point presented is sufficient if it directs the attention of the Court to the error relied upon. The purpose of the rule is that "greater attention will be directed to the presentation of the merits of the appeal, and less attention given to the mechanics of the brief". See, *Fambrough v. Wagley, et al., 140 Tex. 577, 169 S.W.2d 478.*

Such cases as this *Moorman* case, and *McDonald v. New York Central Mutual Fire Ins. Co., (Tex. Sup) 380 S.W.2d 545* (though there was no assignment of error in the latter case in the trial court, as there was in our case) cannot be sustained consistent with accepted standards, under the Fourteenth Amendment, required of state courts in affording equal protection of the laws, and a fair determination of claimed vested property rights under due process.

The reasonable and fair disposition of this case, in order to establish equal and uniform treatment and protection between all litigants, is to reverse and remand the case to the Court of Civil Appeals. If that Court indeed finds the evidence insufficient to support the verdict against the beneficiary of the testamentary option, and finds the facts fully developed, then the Court of Civil Appeals may adhere to its reversal and rendition of the judgment. On the other hand, the Court of Civil Appeals may remand the case for a new trial and give respondents the opportunity of

presenting additional evidence, if there be such. (Chief Justice Calvert's dissent in *Barker,* supra).

The Supreme Court of the United States does not sit, or act, to decide state law. But where procedural refinements are attempted, arbitrarily and capriciously, in such a way as to deny a fair determination of the merits of the litigants' claim, then a case is presented for relief through this Court.[2] This case presents an appropriate and timely opportunity for the Court to consider the procedural guarantees afforded state litigants under the Fourteenth Amendment in civil cases in the state courts.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Supreme Court of Texas.

Respectfully submitted,

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[2]See, *Hovey v. Elliott, 167 U.S. 409, 42 L.ed. 215, 17 S.Ct. 841;* and *National Union of Marine Cooks v. Arnold, 348 U.S. 37, 99 L.ed. 46, 75 S.Ct. 92; dissenting opinion 99 L.ed. 52, Black, J.*

APPENDIX A

OPINIONS BELOW

IN THE SUPREME COURT OF TEXAS

NO. A-10388

The will of Hicklin P. Hunnicutt, deceased, gave Miss Helen Mar Hunnicutt an option to purchase 1,000 acres of land owned by the testator in Dimmit County for $8,000.00 to be paid to the executor within one year after the probate of the will. It further directed that in the event she failed to exercise the option by reason of her death or some providential hindrance, the land should be sold by the executor and the proceeds divided among a number of schools, hospitals and other eleemosynary organizations as provided in the will. Miss Hunnicutt died intestate about ten months after the will was admitted to probate. After her death but within the period during which the option might be exercised, the administrator of her estate tendered $8,000.00 to The Austin National Bank, Independent Executor of the estate of Hicklin P. Hunnicutt, and requested a conveyance of the land. This suit was then instituted by the Bank to obtain a judgment construing the will and determining whether the option had been exercised either by Miss Hunnicutt or by her personal representative.

All persons interested in the will or estate of Hicklin P. Hunnicutt were named as parties, but the proceeding developed into a controversy between the heirs and personal representative of Helen Mar Hunnicutt, who are respondents here, and the various organizations which claim that the will entitles them to the proceeds

of the land in the event the option was not exercised. The Austin Presbyterian Theological Seminary and other representatives of the latter group are our petitioners. The single special issue submitted to the jury inquired whether Miss Hunnicutt had elected to exercise the option.[1] The issue was answered by the jury in the negative, and judgment was rendered on the verdict decreeing that the option was not exercised by Miss Hunnicutt and could not be exercised by the administrator of her estate, and directing the Bank to sell the land and distribute the proceeds as provided in the will. The Court of Civil Appeals concluded that an exercise of the option by Miss Hunnicutt was established by the evidence as a matter of law. It reversed the judgment of the trial court and remanded the cause for further proceedings. 381 S.W.2d 408. We reverse the judgment of the Court of Civil Appeals and affirm that of the trial court.

Helen Mar Hunnicutt lived for many years in the home of Hicklin P. Hunnicutt and his wife, Mrs. Bertha M. Hunnicutt. She was the niece of Mrs. Hunnicutt. Mr. Hunnicutt regarded her as his adopted daughter and so referred to her in his will. The land in question is part of a 2,000-acre ranch formerly owned by Mrs. Hunnicutt as her separate property. She died in 1943 leaving a will which devised the ranch to her husband and Helen Mar Hunnicutt in equal shares. It was partitioned by them in 1945, the north one-half being set apart to Hicklin P. Hunnicutt and the south one-half to Helen Mar Hunnicutt. Mr. Hunnicutt's will was

[1]The phrase "elected to exercise" was defined in the charge as meaning "any statement or statements made by Helen Mar Hunnicutt to Bronson C. Turner, if any, which communicated to him her then existing intention, if any she had, and her then definite decision, if any she had made, to purchase the land in question and to pay the $8,000.00 in cash within one year from the probate of the will of Hicklin P. Hunnicutt."

written prior to the division and refers to his one-half interest in the land, but the parties recognize that the option provisions apply to the north one-half of the property set apart to him in the partition.

Hicklin P. Hunnicutt died on April 16, 1953. He left a holographic will dated January 5, 1944, and a holographic codicil thereto dated March 15, 1948. These instruments were admitted to probate as his last will and testament on May 26, 1953. In Items 3 and 4 of the original will, the testator gave his half brother, Thomas B. Clark, a lot in Stamford, certain personal property, and $5,000.00 cash, or so much thereof as might be realized upon the surrender of seven bonds, and left Helen Mar Hunnicutt his interest in the home and contents, all capital stock of The Austin National Bank owned by him at the time of his death, and a $1,000.00 H.O.L.C. bond. Provision for the disposition of Dimmit County land and the distribution of the proceeds was made in Item 5, in a section entitled "Proviso to Item 5", and in the codicil, all of which are quoted in the opinion of the Court of Civil Appeals. Item 6 was introduced by a statement that "the foregoing 5 items of this written will dispose of all of my estate except three small pieces of property which are not herein appropriated". The three properties were then described, and the executor was directed to convert the same into cash, use the proceeds to pay debts and expenses, and divide the remainder equally between Thomas B. Clark and Helen Mar Hunnicutt.

According to the inventory and appraisement of Mr. Hunnicutt's estate, he owned at the time of his death 200 shares of common stock of The Austin National Bank worth $18,000.00. His interest in the home was appraised at $10,000.00, and his interest in the Dimmit County land was valued at $25,000.00. Aside from these

three items, the estate consisted of bonds, cash and personal property of the aggregate value of approximately $4,000.00. The H. O. L. C. bond mentioned in the will is not listed in the inventory.

Any contention that the option could be exercised by the personal representative of Helen Mar Hunnicutt after her death was abandoned by respondents on appeal. The issue thus narrows to whether the testamentary offer was accepted by Miss Hunnicutt during her lifetime. She did not ever communicate with the Bank in writing about the matter, but the case was tried on the theory that an oral acceptance by her would have given rise to an enforceable bilateral contract performable by the administrator of her estate. Mr. B. C. Turner, Trust Officer of the Bank, discussed the option with Miss Hunnicutt on several occasions and testified fully regarding his conversations with her. It does not appear that she ever mentioned the subject to anyone else connected with the Bank, and the only evidence tending to show whether or not the option was exercised is the testimony of Mr. Turner and the surrounding circumstances.

The material portions of Mr. Turner's testimony are quoted at length in the opinion of the Court of Civil Appeals and will not be repeated here. Respondents say that the facts are undisputed, and that whether the option was exercised is a question of law for the court. We do not agree. The testimony given by Mr. Turner does not establish with certainty all that was said in his conversations with Miss Hunnicutt, and he was impeached by proof of a prior inconsistent statement bearing directly upon the basic issue in the case. The jury was thus free to accept or reject all or any part of his testimony, and in these circumstances the question of what was said and done between the

parties is one of fact. See Keesey v. Old, 82 Tex. 22, 17 S.W. 928; Maddox Motor Co. v. Ford Motor Co., Com. App., 23 S.W.2d 333.

When the evidence is viewed, as it must be, in the light most favorable to the verdict of the jury, it appears that Miss Hunnicutt never told Mr. Turner that she had decided to purchase the land, that she would take the property, or that she exercised her option to do so. She did say to him that "she wanted to take the property" and that "she wished to exercise the option", but "each time it was discussed she stated that she did not have the available cash at that time to exercise the option". It was Mr. Turner's definite impression that she desired and intended to exercise the option within the twelve-months period and pay the money. Respondents say that this shows as a matter of law that Miss Hunnicutt expressed to Mr. Turner her existing intention to exercise the option and pay the money within the time allowed by the will.

It has been said that "any act signified to the optioner which brings to his mind the present intention of the optionee to exercise the option privilege is sufficient". See James on Option Contracts § 823. This refers, of course, to the expression of an intention to exercise the option then and there. The jury was entitled to conclude from all the evidence that Mr. Turner understood that Miss Hunnicutt intended to exercise the option in the future, and an expression of that intention would not be sufficient to create a bilateral contract of purchase and sale. The question is whether she accepted the testamentary offer and thereby bound herself to take the land and to pay the $8,000.00 within one year after the will was probated. See 1A Corbin on Contracts, 1963 ed., § 264.

The exercise of an option like the acceptance of any

other offer must be positive and unequivocal. See Restatement of the Law of Contracts § 58; 91 C. J. S. Vendor and Purchaser § 10. "A valid acceptance * * * must be unequivocally expressive of an intent to create thereby, *without more,* a contract." Minar v. Skoog, 235 Minn. 262, 50 N.W.2d 300. See also Asburn v. Hugh L. Bates Lodge, 62 Ohio App. 430, 24 N.E.2d 638; Havens v. American Fire Ins. Co., 11 Ind. App. 315, 39 N.E. 40. Professor Williston observes that this requirement is often treated as identical with the requirement that an acceptance must not change, add to or qualify the terms of an offer. He then points out that:

> "* * * even though no change in the offer is suggested in the reply of the offeree, it nevertheless may not so clearly indicate assent to the offer as to create a contract. Thus a reply to an offer to lease premises in the following terms was held not to make a binding contract: — 'I have decided on taking No. 22 Belgrave Road, and have spoken to my private agent . . . who will arrange matters with you'. The same is true of a telegram to a bidder for public work. 'You are low bidder. Come on morning train'; also of the following reply to an offer to sell coal, 'Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week'. Likewise a reply to an offer to sell land, 'Have twice attempted the tender of the first payment of $500 upon the agreement made between us on the 7th of December last. I will meet you, etc., when I shall be ready to make tender of the money and execute the proper agreements thereupon', is insufficient." I Williston on Contracts, 3rd ed. 1957, § 72.

This would be an entirely different case if Miss Hunnicutt had stated to Mr. Turner without qualification that she wished to exercise the option or wanted to take the property. The words "wish" and "want" can be

and frequently are used, however, to express hope or desire unaccompanied by any expectation or intention of gratifying the wish or want immediately. It may fairly be inferred that they were used in that sense by Miss Hunnicutt, because each time the matter was discussed she told Mr. Turner that she did not have the available cash at that time to exercise the option. Although payment of the money may not have been essential to the creation of a binding bilateral contract, her statements indicate that she did not intend to obligate herself at the time but expected to exercise the option when she felt the $8,000.00 was available.

It is true that Miss Hunnicutt was financially able to pay the $8,000.00. At the time of her conversations with Mr. Turner, she owned the home place, her one-half of the ranch, government bonds worth approximately $10,000.00, some 25 shares of capital stock of The Austin National Bank, and probably had about $8,500.00 on deposit with the Bank. She was also entitled to the 200 shares of bank stock bequeathed to her by Hickin P. Hunnicutt, although this stock was not distributed by the executor during her lifetime. Miss Hunnicutt's net worth was thus in excess of $80,000.00, but it was her opinion that she did not have the available cash to exercise the option.

On the basis of the valuation of the ranch as shown by the evidence and assuming that the property could have been readily sold at that figure, it clearly would have been to Miss Hunnicutt's economic advantage to exercise the option. There is no evidence, however, that anyone was interested in buying the land or that a purchaser able and willing to pay its full value could have been easily found. In any event we are not concerned here with an outright devise or a devise subject to a charge, and our view as to what Miss Hunnicutt

should have done is not material to the present inquiry. She was given an option to buy the property, and her estate is now entitled to take the same for the stipulated price only if the offer ripened into a contract of purchase and sale during her lifetime.

The surrounding circumstances tend to support rather than to destroy the finding of the jury. Miss Hunnicutt was never married, and most of her adult life was spent in scholarly pursuits. A member of the original staff of the Texas College of Arts and Industries at Kingsville, she was employed at the time of her death as a Spanish translator in the Archives at The University of Texas. Several witnesses described her as a shy, quiet, reserved person who was very careful with her money. She died unexpectedly on March 13, 1954, while visiting a friend in Blanco County.

Since Miss Hunnicutt was an intelligent, educated person, it is reasonable to assume that she was capable of making it clear to Mr. Turner if she wished to obligate herself to take the land. Although she had owned a half interest in the ranch for some ten years, she did not know where it was located and was not certain that she found it on the one occasion she attempted to do so. Her investments in bank accounts, stocks and bonds were relatively stable in value and required little supervision. A person of her background and temperament may well have been reluctant to use the funds represented thereby to purchase a distant ranch with which she was not familiar, and certainly would have been inclined to defer making a final decision while there was still ample time to consider the matter. There is no evidence that she ever discussed with Mr. Turner any arrangements for paying the $8,000.00 or made any preparations for taking over management of the property, and it does not appear that she definitely

expected to have the money "available" within the period prescribed by the will. We hold that acceptance of the testamentary offer has not been established as a matter of law.

Respondents contend that the Bank has no power to sell the land even if the option was not exercised. They say that the stipulation concerning the death of Helen Mar Hunnicutt in the "Proviso Relative to Item 5" refers to her death during the testator's lifetime. Since she did not die prior to the death of Hicklin P. Hunnicutt, respondents insist that the contingency giving rise to the power of sale never occurred and that the land passed as part of the residuary estate under the provisions of Item 6. In support of this contention they cite the cases involving a devise of the fee with provision for a gift over in the event of the death of the first taker. References to death of the first taker in that situation are usually construed to mean death prior to that of the testator.

As pointed out in St. Paul's Sanitarium v. Freeman, 102 Tex. 376, 117 S. W. 425, 132 Am. St. Rep., 376, the reasons for that rule of construction are variously stated. One reason is that since death is a certain event, a reference to the death of the first taker must be construed to mean death during the lifetime of the testator if it is to be a contingent event as the testator probably intended. "But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the

death of the testator." Britton v. Thornton, 112 U. S. 526, 5 S. Ct. 291, 28 L. Ed. 816.

Here the testator was dealing with an event which might or might not ever take place, i.e. the failure of Helen Mar Hunnicutt to exercise the option "by reason of her death or some Providential hindrance". Item 6 of the will does not purport to be a general residuary clause, and a reading of the entire instrument discloses that the testator contemplated that the land would either be purchased by Miss Hunnicutt or be sold by the Bank. We are satisfied that he intended for the Bank to sell the property and divide the proceeds as set out in the Proviso if Miss Hunnicutt was prevented from exercising the option by her death subsequent to his.

Respondents' remaining points of error in the Court of Civil Appeals have been considered and are overruled. They had no point there invoking the jurisdiction of the intermediate court to determine whether the finding of the jury is contrary to the overwhelming weight and preponderance of the evidence. The judgment of the Court of Civil Appeals is accordingly reversed, and that of the trial court is affirmed.

RUEL C. WALKER
Associate Justice

Opinion delivered: May 19, 1965.

ORDER OF THE SUPREME COURT OF TEXAS

July 7, 1965.

No. A-10,388.

The Austin Presbyterian Theological Seminary et al.	)	From Travis
vs.	)	County, Third
Thomas D. Moorman, Administrator et al.	)	District.

Respondents' motion for rehearing, filed in the above numbered and entitled cause on June 3, 1965, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 11,225

This controversy is between beneficiaries under the will of Hicklin P. Hunnicutt, and their successors in interest, and principally concerns the disposition to be made of 1000 acres of land in Dimmit County owned by the testator at the time of his death.

Hicklin Prescott Hunnicutt died in Austin, Travis County, Texas, April 16, 1953. He left a holographic will dated January 5, 1944, and a holographic codicil dated March 15, 1948. This will and codicil were duly probated in Travis County May 26, 1953, and, as authorized by the will, the Austin National Bank qualified as Independent Executor of his estate.

Under this will the testator left to his half brother, Thomas B. Clark, the sum of $5000.00 or so much of that amount as might be realized from the sale of certain bonds. Also bequeathed to Mr. Clark were two gold watches, personal effects and a city lot in Stanford, Texas.

The testator devised and bequeathed to Helen Mar Hunnicutt, described in his will as "my adopted daughter", his one-half interest in his present house in Austin, Texas, and all appurtenances "standing thereon" and all household effects therein. Testator also bequeathed to Helen Mar Hunnicutt all the shares of the capital stock of the Austin National Bank which he owned at the time of his death; also one H.O.L.C. Bond in the sum of $1000.00.

The inventory filed in testator's estate reflects that he owned 200 shares of capital stock in the Austin National Bank and that its value was $18,000.00. The value of the one half interest in the home place is shown by the inventory to be $10,000.00. The H.O.L.C. Bond, referred to in the will is not listed in the inventory.

Item 5 "and Proviso relative to item 5" of the will and the codicil form the basis for this controversy and will be set forth in full. Before doing so, however, reference is made to Item 6 of the will in which it is stated that "the foregoing five items of this written will dispose of all of my estate except three small pieces of property which are not therein appropriated". After describing such property, the will directed that they be sold by the executor and the proceeds used to pay testator's debts and expenses, the remainder to be divided equally between Mr. Clark and Helen Mar Hunnicutt.

Item 5 the proviso and the codicil follow:

"Item 5—I own a share amounting to one-half of a tract of two thousand acres of land located in the extreme northern part of the Blas Reyes eleven league grant of land in Dimmit County, Texas. Helen Mar Hunnicutt owns the other one-half of this same tract of two thousand acres. I anticipate that when she and I will divide the said tract between ourselves I will become owner of the northern one-half and she the southern.

It is, therefore, my will and desire, and I accordingly direct my executor to extend to Helen Mar Hunnicutt the option to purchase for herself and in her own name all of my one-half interest in the said tract of two thousand acres located in Dimmit County, Texas, it being the northern part of the Blas Reyes grant of eleven leagues, for a total cash consideration of Six Thousand dollars ($6,000.00) to be paid to my executor within the period one year from the date of probate of this my will. If she elects to exercise the said option so extended to her, and shall pay that sum of money to my Executor herein named, he is hereby directed to proceed at once with the distribution of that sum of money in the manner which I here describe as follows: —

The amount for each beneficiary is set opposite the name.

The Austin Presbyterian Theological Seminary, Austin, ----------twenty per cent.
The First Southern Presbyterian Church, Austin, ----------twenty per cent. to be applied on the debt against its physical property.
The Board of Trustees of Shriners Hospitals for Crippled Children, Endowment Fund; (Philadel.) ----------ten per cent.
Texas Scottish Rite Hospital for Crippled Children (Dallas)-------ten per cent.

Masonic Orphans Home, Ft.
Worth, Tex. ----------five per cent.
Masonic Home at Arlington, Texas--five per cent.
Eastern Star Home at Arlington,
Texas ----------five per cent.
Austin Chapter of Boy Scouts------five per cent.
Austin Chapter of Girl Scouts------five per cent.
Austin Chapter of American Red
Cross ----------five per cent.
Executor's fee for distribution------five per cent.
Children's Home of Austin, Texas---five per cent.

. . .

Proviso relative to Item 5 —

In the event that Helen Mar Hunnicutt shall fail to exercise the option offered her in Item 5 above by reason of her death or some providential hindrance, then my executor shall sell all my interest in the two thousand acre tract of land in Dimmit County by first advertising it in a newspaper for sale; and shall specify in the advertisement that a royalty of one-sixteenth will be retained by the vendor on all mineral, oil and gas that in future time may be developed within the land. The deed to be executed and delivered to the successful bidder shall carry the one-sixteenth mineral-right clause in favor of the Austin Presbyterian Theological Seminary of Austin, Texas.

If all bids received should, in the judgment of my executor, appear unsatisfactory to him, he may postpone effort at sale and wait for a more favorable market value on the land. When the sale shall be completed and the money delivered into the possession of the executor, he shall segregate Six Thousand Dollars ($6,000.00) with which to satisfy and pay off the percentage legacies designated in the list of legatees in Item 5 above. Then, after first paying all bills of expenses, my executor shall distribute the remainder over in the manner as follows:—

Austin Presbyterian Theological
Seminary ----------70 per cent.

Fund for aid to aged retired preachers,
Southern Presbyterian, ----------20 per cent.
Board of Trustees, Scottish Rite
Dormitory, Austin, Texas, --------10 per cent."

CODICIL

"The intent and purpose of this Codicil is to change and increase the amount of cash money which Helen Mar Hunnicutt is to pay, according to said Will dated January 5, 1944, to my Executor for one thousand acres of land out of the Blas Reyes grant situated in Dimmit County, Texas, about six miles east of Carrizo Springs, from six thousand dollars ($6000.00) as expressed in the said Will to the sum of eight thousand ($8000.00) dollars; and also to authorize my Executor to augment the said sum of eight thousand ($8000.00) dollars to the sum of Ten Thousand ($10000.00) dollars by using a portion of my undesignated E bonds not already appropriated in my Will. My Executor will then proceed to distribute the sum of ten thousand (10000.00) dollars according to the schedule described in Item No. 5 of my said Will of January 5, 1944.

In testimony whereof I have hereto affixed my signature on this 15 day of March 1948."

Helen Mar Hunnicutt died in Blanco County, Texas, March 13, 1954.

On April 30, 1954, the administrator of the estate of Helen Mar Hunnicutt tendered to Austin National Bank as Executor of the Estate of Hicklin P. Hunnicutt the sum of $8000.00 in cash in payment of the amount required of her by the will of Hicklin P. Hunnicutt in order to obtain the ownership of the 1000 acres of Dimmit County land referred to in the will,[1]

[1]The 2000 acre tract of land in Dimmit County had been partitioned, Mr. Hunnicutt obtaining the north 1000 acres and Miss Hunnicutt the south 1000 acres.

and requested of the Executor a deed to the land.

The Executor Bank, being uncertain that its acceptance of such sum, for the purpose stated, was required of or authorized by it under the circumstances to be related merely received such money and holds it subject to the judgment of a Court of competent jurisdiction, and for the purpose of securing such judgment instituted this suit.

This case was tried to a jury which answered the following single issue submitted to it as follows:

"SPECIAL ISSUE NO. 1:

Do you find from a preponderance of the evidence that the deceased, Helen Mar Hunnicutt, sometime between the probate of the will of Hicklin P. Hunnicutt and her own death elected to exercise the option extended to her by the will of Hicklin P. Hunnicutt to purchase his interest in the Dimmitt County tract of land?

Answer 'Yes' or 'No'.

Answer: NO.

By the phrase, 'elected to exercise', as used in the foregoing issue, is meant any statement or statements made by Helen Mar Hunnicutt to Bronson C. Turner, if any which communicated to him her then existing intention, if any she had, and her then definite decision, if any she had made, to purchase the land in question and to pay the $8,000 in cash within one year from the probate of the will of Hicklin P. Hunnicutt."

Based on this verdict, judgment was rendered that "Helen Mar Hunnicutt did not elect to exercise the option to purchase the Dimmit County land . . . and that such option was not exercised by Helen Mar Hunnicutt and was not exercisable and exercised by . . ." the administrator of her estate, "or by anyone else,"

and all relief based on the exercise of such option was denied.

The only person who, as far as the record discloses, had any communication with Miss Hunnicutt regarding the option given her by the will of Hicklin P. Hunnicutt to acquire the 1000 acres of land in Dimmit County for $8000.00 was Mr. Bronson Turner, trust officer for the Executor Bank and who was authorized by it to act for it as Executor of this Estate.

There is no evidence that Miss Hunnicutt performed any act, other than by speaking, which would indicate that she did or did not exercise her option to purchase this land.

Since appellants assert there was no evidence to support the finding of the jury and since some of appellees assert there was no evidence to support a contrary finding by the jury, we will recite all of the testimony given by Mr. Bronson, in which he testifies to what Miss Hunnicutt said, or did not say, regarding this option.

"Q If you have stated that during her lifetime that Helen Mar Hunnicutt discussed with you an option extended to her by the will of Hicklin P. Hunnicutt, then state as well as you can how often you discussed this with her and, as best you recall, what was said.

A I remember discussing the option with her on two or possibly more occasions. Each time in the discussion she stated that she wished to exercise the option but that she did not have the available cash at that time.

. . .

A Miss Hunnicutt did not inform me in writing or otherwise that she had decided to purchase the Dimmit County land under the option pro-

visions of the will. She indicated to me on two or more occasions that she wanted to purchase the land but did not have the available cash to do so at the time.

. . .

Q What, if anything, did Helen Mar Hunnicutt ever tell you as to whether she was able to exercise the option which may have been granted her under the will of Hicklin P. Hunnicutt?

A Each time it was discussed she stated that she did not have the available cash at the time to exercise the option.

Q If you have stated that Helen Mar Hunnicutt has told you anything with respect to her ability to exercise the option, then what did she tell you in this regard?

A All Miss Hunnicutt told me at the times we discussed the option was that she did not have the available cash.

. . .

Q (By Mr. Cofer) All right, sir. I am going to ask you some questions and ask you if that is not substantially, Mr. Turner, what occurred. You offered to Helen Mar Hunnicutt, as specified in the will, the opportunity of exercising this option?

A Yes, sir.

Q And she told you that she would take the property?

A That she wanted to take the property.

Q All right. She wanted. She didn't say she would take it? She said she wanted to take it?

A No, sir, she did not say that she would take it.

Q She did not say that she would take it?

A No, sir.

Q She said she wanted to take the property?

A Correct.

Q Is that right?

A Yes, sir.

. . .

Q Now, Mr. Turner, in any of the conversations that you had with Helen Mar Hunnicutt, state whether or not that she told you that she elected to take the option?

A She never used the word, 'elected'.

Q Did she state whether or not, in any of these conversations, she told you that she accepted the option in the will?

A No word to that effect.

Q State whether or not that she ever said anything or did anything more than to tell you that she wanted to exercise the option.

A That is correct.

Q Did Helen Mar Hunnicutt ever discuss with you—I will ask you this, Mr. Turner. State whether or not Helen Mar Hunnicutt told you that she didn't know where she would get the money to exercise the option.

A She never made such a statement.

Q Well, what statement did she make with reference to the money?

A The only statement that she made to me was that she did not have the available cash.

. . .

Q And you are sure you called her attention to the fact that it didn't make any difference if she didn't have the money then. She had within—twelve months within which to pay it?

A Correct.

Q Yes, sir. Now, is it fair to say that it was your definite impression at that time and all times that you talked to her about it, that she desired and intended to exercise the option within the twelve-months period and pay the money?

A Yes, sir.

Q Do you think you told her, Mr. Turner, that all that remained to be done was to pay the money?

A I do not recall having used such language.

Q You don't say that you didn't tell her?

A I wouldn't say that I didn't, no, sir.

. . .

Q State whether or not Helen Mar Hunnicutt ever informed you or the bank, in writing or otherwise, that she had decided to purchase the Dimmit County land under the option provisions of the will.

A Miss Hunnicutt did not inform me in writing or otherwise that she had decided to purchase the Dimmit County land under the option provisions of the will. She indicated to me on two or more occasions that she wanted to purchase the land but did not have the available cash to do so at the time.

Q State whether or not Helen Mar Hunnicutt ever informed you or the bank in writing or otherwise that she would take the Dimmit County land which Hicklin P. Hunnicutt owned.

A No.

Q State whether or not Helen Mar Hunnicutt ever informed you or the bank that she exercised her option under the will, either in those words or words of like meaning, and if she did so inform you or the bank, please give as near as you can, the words used.

A Miss Hunnicutt did not express to me that she exercised the option that was given to her under the will.

Q What, if anything, did Helen Mar Hunnicutt ever tell you as to whether she was able to exercise the option which may have been granted to her under the will of Hicklin P. Hunnicutt?

A Each time it was discussed she stated that she did not have the available cash at the time to exercise the option.

Q If you have stated that Helen Mar Hunnicutt has told you anything with respect to her ability to exercise the option, then what did she tell you in this regard?

A All Miss Hunnicutt told me at the times we discussed the option was that she did not have the available cash.

Q Did Helen Mar Hunnicutt during her lifetime ever pay or offer to pay any money to The Austin National Bank in connection with the option contained in the will of Hicklin P. Hunnicutt?

A No.

Q Did Helen Mar Hunnicutt ever discuss with you any financial arrangements for the sum of money or any part thereof, necessary to purchase the land covered by the option in the will of Hicklin P. Hunnicutt?

A No.

. . .

Q All right. So she told you she wanted to take the property, but did not tell you that she would take the property?

A Correct.

. . .

Q She never told you she definitely would take this property and pay the $8,000 to the bank did she?

A She never told me definitely."

In addition to this testimony, the only other statements on this subject attributed to Helen Mar Hunnicutt came by way of Mr. E. Wayne Thode, testifying to a conversation with the trust officer, Mr. Turner. At the time of this conversation, Mr. Thode was an attorney for the administrator of the Helen Mar Hunnicutt estate. We quote Mr. Thode:

"Q What, if anything, did the then administrator of the Estate of Helen Mar Hunnicutt do with reference to said option provision in the will of H. P. Hunnicutt?

A The first action taken was to make inquiry from The Austin National Bank, the Executor of the Estate of Hicklin P. Hunnicutt, as to whether or not the option had been exercised. I was referred to Mr. B. C., or Mr. Bronson C. Turner, the Trust Officer and official acting for the bank as Executor of the Estate of Hicklin P. Hunnicutt. Mr. Turner informed me that he had made the offer to Helen Mar Hunnicutt, as specified in the will, and that she told him she would take the property, but that she had not paid the amount specified in the will and codicil—$8,000.00—before her death.

. . .

A . . . I said to him 'Mr. Turner, didn't she tell you, when you offered her the option under the terms of the Hicklin P. Hunnicutt will, that she would take the 1000 acres? . . . Mr. Turner replied, 'Helen informed me, when I asked her, that she would take the property . . .'

. . .

A . . . In substance he [Mr. Turner] made that same statement to me during each of our conversations about this matter, that is, that he offered her the option under the terms of Hicklin P. Hunnicutt's will, and that she told him she would take the property, . . ."

Miss Hunnicutt was a reserved, quiet, shy individual, not very talkative, who had devoted her life to teaching and scholarship. At the time of her death and for some years before, she was a Spanish translator at the Archives of the University of Texas. She was extremely frugal.

Miss Hunnicutt had been informed by Mr. Turner that the 1000 acres of land which she was given the privilege of purchasing had been appraised for estate purposes at $25.00 per acre.[2] This 1000 acres and the 1000 adjoining acres which Miss Hunnicutt owned in her own right had been leased for grazing and surface purposes for several years for a total rent of $2500.00.

The inventory of Miss Hunnicutt's estate and other testimony showed that at her death Miss Hunnicutt had a checking account of $3,800.00 and a savings account of $4,700.00 in the Austin National Bank and over $10,000.00 in U.S. Bonds. She also had 309 shares in the Austin National Bank valued at $20,000.00.

Appellants filed motions for an instructed verdict and for judgment notwithstanding the verdict of the jury. The Court's action in overruling these motions is the basis of appellants' first two points. It is our opinion that they should have been granted and we sustain appellants' first two points.

When we examine closely what Mr. Turner testi-

[2]There is evidence to the effect that this land was worth $35,000.00 at testator's death.

fied that Miss Hunnicutt said regarding the option in the will as distinguished from what she did *not* say, we find that one thought, and only one thought, clearly emerges. She "wanted" the land. There is not the slightest intimation from Miss Hunnicutt that she did *not* want the land. To say, as some appellees say that the use of the word "want" by Miss Hunnicutt is mere precatory language, to express a desire or wish, is to attribute to Miss Hunnicutt a lack of intelligence and a childishness which the record refutes. Miss Hunnicutt was an educator. She was on the original staff of A and I College at Kingsville. She was a Spanish translator. She had lived a scholarly life. She was very careful with her money. She was very saving.

Miss Hunnicutt had been furnished with a copy of the will and had, presumably, read it. Mr. Turner had explained the option to her. She knew, peradventure of any doubt, that she had to pay $8000.00 for the 1000 acres in order to receive it. She repeatedly referred to the financial requirement. She also knew that this was an advantageous bargain. She knew that the 1000 acres was renting for $1250.00 per annum, a 10% return, less taxes, on a $12,500 value, a 5% return on a valuation of $25,000.00. She knew the land was appraised for $25,000.00. She knew, as everyone knows, that land, the surface, does not depreciate. She knew, as everyone knows, that the general trend of land values is up.

To say that Miss Hunnicutt would not appreciate and seize the opportunity granted to her by the will is unrealistic and would convict her of acting contrary to her frugal nature. Webster states that the word "frugal", in an economic sense, implies "the use of money or resources to the best advantage". Webster Int. Dictionary, 2d ed., unabridged. There is nothing

in this record to indicate that Miss Hunnicutt could have used $8000.00 to better advantage than to acquire this 1000 acres. As for her saving bent, first there must be something to save.

The will reflects that the testator did not contemplate that Miss Hunnicutt would voluntarily refuse to pay $8000.00 for the 1000 acres. He provided an alternative only in the event she failed to exercise the option "by reason of her death or some providential hindrance". This language clearly implies that the testator believed that the option granted Miss Hunnicutt was beneficial to her and was in the nature of a gift and not a commercial transaction or sale. If the form of the will had been a devise of the 1000 acres subject to a charge of $8000.00, then there would have arisen a presumption that the bequest was beneficial and that she had accepted it. See Annotation 93 A.L.R.2d 8, 96 C.J.S., p. 944.

The negative testimony in the record as to what Miss Hunnicutt did *not* say regarding the option is, in our opinion, of no probative force. Miss Hunnicutt was not called upon to say anything. She had no duty to speak. She had the privilege of saying what she pleased about this option. She had the privilege of saying nothing. If what she said amounted to an acceptance of the offer in the will, what she did not say should not have the effect of destroying what she did say. The words which Miss Hunnicutt did not say about this option could be piled up almost ad infinitum. Did she say for "certain" she would take the land? Did she say "positively" that she would buy the land? Did she say "unequivocally" that she elected to exercise her option to purchase the land? Multiplied a thousand fold, this is no evidence that she did not accept or exercise the option and detracts not one whit from what was said.

Miss Hunnicutt was constant in expressing her intent regarding this option on the land it represented. This intent is unmistakable. It was to take the land. The words she used to express this intent were layman's words. She "wished" to exercise her option. She "wanted" to take the property. Nevertheless, they have a single meaning.

We hold that under the evidence Miss Hunnicutt, as a matter of law, accepted testator's offer to permit her to purchase the 1000 acres for $8000.00 to be paid as provided in the will. We also hold that considering only the evidence favorable to the verdict and indulging in all intendments in that behalf there is no evidence of probative force to sustain the verdict, and that this is a matter about which reasonable minds cannot differ.

Miss Hunnicutt did not, herself, pay the $8000.00 required by the will, her death intervening. This sum was paid by her administrator within the time fixed by the will. We hold that such payment satisfies the requirements of the will.

Miss Hunnicutt stated that "she did not have the available cash *at that time*" (italics added) in discussing the option with Mr. Turner.[3] There is no finality in this statement. In fact, it recognizes the temporary lack of, not money, but "available" money. Clearly, it seems to us, Miss Hunnicutt had in mind, in due time, making the $8000.00 available, and paying it for the land.

There is nothing in the will compelling simultaneous acceptance of the offer to buy and payment of the money. The acceptance of the offer would imply the

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[3]Mr. Turner also testified, "Each time it was discussed she stated that she did not have the available cash at the time to exercise the option."

promise to pay but payment might be deferred for a year after probate of the will. This distinction between an election to exercise an option and performance by the optionee is recognized in James on Option Contracts (1916) Sec. 839, from which we quote:

> "Election and Performance Distinguished. Election, as we have seen, is the act which converts the option into a binding promise on the part of the optionor to sell. In a very broad sense it is an act of performance, but a performance which is optional with the optionee. The performance we now have in mind is one which grows out of the election and thus becomes obligatory upon the optionee. As thus viewed the distinction between election and performance is apparent, since the former has to do with the creation of the contract and the latter with the fulfillment of the terms of the contract after its creation."

This authority also states, Sec. 1241, that, "Where the optionee dies after election, the devisee under his will may maintain suit for specific performance".

In 3 Williston on Contracts, Revised Edition, Sec. 853, this pertinent discussion is made:

> "Though the condition as to time must be strictly complied with, a distinction should be noted: If the option offers a unilateral contract, then performance must be tendered within the stated period, whereas, if it offers a bilateral contract, while acceptance must be made within the time fixed, performance need not necessarily be begun or completed so promptly in the absence of controlling stipulations in that respect. But an option may require both that notice of intention to exercise the option be given within a specified time and also that the performance be rendered by a certain date. In such a case failure to give such notice on time is fatal, as subsequent failure to render performance seasonably would also be."

Our own Courts have considered the acceptance of an option as separate from performance by the optionee where permitted by the terms of the option. In Lambert v. Taylor Telephone Cooperative, Inc., 276 S.W.2d 933, Eastland Civ. App., it is stated:

> "Appellee, as required by the contract, notified appellant in writing of its exercise of the option. This is all that is required by the contract to effect an acceptance. Of course, appellee was required to pay the purchase price, but payment was required only after delivery by appellant of the abstracts and deeds. In the absence of a provision to the contrary, payment is not necessary to effect an acceptance."

See also Wall v. Trinity Sand and Gravel Company, 369 S.W.2d 315, Tex. Sup., where it was held that acceptance of an option without payment of the consideration created a binding contract.

We hold that the $8000.00 payment timely tendered by the Administrator of the Helen Mar Hunnicutt Estate was made pursuant to a legal obligation of such estate.

Before leaving this phase of the case we desire to emphasize that we are expounding a will, not a business contract. While, as stated, the language used by the testator in the will created a formal option, yet from the entire will, the relationship of the parties and the attendant circumstances it is evident that the testator intended to bestow upon Miss Hunnicutt a substantial benefit and that a gift was in his mind to the extent that the value of the land exceeded $8000.00.[4]

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[4]Appellees, The Scottish Rite Educational Association of Texas and the Board of Annuities and Relief of the Presbyterian Church in the United States, in their brief say: "All this discussion leaves us with the problem originally facing us—construction of the option provision in the will of Hick-

In Taylor v. Sanford, 108 Tex. 340, 193 S.W. 661, the Court in considering the effect of an onerous deed not delivered before death of the maker said, "As a rule of reason and common sense, a delivered instrument plainly amounting to a deed of gift should operate by a presumed assent until a dissent or disclaimer appears". See also Mattern v. Herzog, 367 S.W.2d 312, Tex. Sup., where the Court very liberally construed an option in a will in order to carry out the intention of the testator and to achieve an equitable result. These authorities and those previously cited convince us that our disposition of this case is in accord with sound legal principles and that it is just.

The religious and benevolent institutions who will be disappointed by our decision and who may question its wisdom and justness should pause and reflect on what their judgment would be if Miss Hunnicutt instead of suffering a fatal illness on April 16, 1953, had been then rendered mentally inert and had remained so until now, the $8000.00 being timely tendered for her by her legal representative. If our present decision is wrong, it would also be wrong under the assumed facts.

Appellants' third and fourth points relate to procedural matters in submitting this case to a jury. Our ruling on the first two points renders these points immaterial. Appellants also have some alternative points which, under our ruling, become inapplicable.

Appellants' fifth point questions the manner, not the amount, in which the attorneys' fees, and expenses, other than simple Court costs which were assessed

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lin P. Hunnicutt. Appellees urge that this problem is quite different from that of construing an option involved in a commercial transaction. We have an option created by will with obvious donative intent on the part of the testator.

against appellants, have been assessed. The Court ordered these items, totaling $3,885.38, paid "according to the following priority:

"(a) From such portions of said funds as were derived from leases, rentals, interest or income other than that derived from the leasing of the property for oil, gas, and other minerals;

(b) From such portion of said funds as were derived from delay rentals from the existing oil and gas lease;

(c) From other available assets of the Estate of Hicklin Hunnicutt, deceased, now on hand."

Appellants do not brief this point except to state their position that the Court should exercise its discretion and assess the costs against the property and funds in dispute.

Appellees other than the Unknown Heirs of H. P. Hunnicutt, have no complaint about the manner in which costs, attorneys' fees and expenses were assessed and ordered paid, saying that the discretion of the Trial Court has not been abused in this respect.

The Unknown Heirs of H. P. Hunnicutt contend that under Item 6 of the will the three pieces of property there mentioned should be sold and, as the will provides, "use the money from the sales to pay off all debts and expenses that may remain to be paid by my estate."

The inventory of the H. P. Hunnicutt estate does not describe any of the items mentioned in this paragraph of the will. Presumably, they were not on hand when the testator died.

We are unable to detect any abuse of discretion by the Trial Court in ordering payment of attorneys' fees

and expenses in the manner indicated. All ordinary Court costs, however, will abide the event and will be assessed against appellees other than the Austin National Bank Executor.

We note from the record that certain features of this litigation, notably an accounting between the parties, have been severed for separate trial. Under these circumstances we believe the appropriate judgment herein is to reverse and remand this cause for further proceedings consistent with this opinion. We further direct that any final judgment herein be made subject to the administration of this estate by the Austin National Bank, Executor, in the event that at such time further administration is necessary.

The judgment of the Trial Court is reversed and this cause is remanded for further proceedings consistent with this opinion.

Robert G. Hughes, Associate Justice

Reversed and Remanded
Filed: July 29, 1964.

APPENDIX B

Constitution of Texas, Art. 5, Sec. 6

§ 6. Courts of Civil Appeals; transfer of causes; terms of judges

Sec. 6. The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme judicial districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices, who shall have the qualifications as herein prescribed for Justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. *Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.* (Emphasis added.)

Each of said Courts of Civil Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a [a] term of six years and shall receive for their services the sum of three thousand five hundred dollars per annum, until otherwise provided by law. Said courts shall have such other jurisdiction, original and appellate as may be prescribed by law. Each Court of Civil Appeals shall appoint a clerk in the same manner

as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

Until the organization of the Courts of Civil Appeals and Criminal Appeals, as herein provided for, the jurisdiction, power and organization and location of the Supreme Court, the Court of Appeals and the Commission of Appeals shall continue as they were before the adoption of this amendment.

All civil cases which may be pending in the Court of Appeals shall as soon as practicable after the organization of the Courts of Civil Appeals be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals to be decided by said courts. At the first session of the Supreme Court the Court of Criminal Appeals and such of [of] the Courts of Civil Appeals which may be hereafter created under this article after the first election of the Judges of such courts under this amendment. The terms of office of the Judges of each court shall be divided into three classes and the Justices thereof shall draw for the different classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices for four years and those who may draw class No. 3 shall hold their offices for six years, from the date of their election and until their successors are elected and qualified, and thereafter each of the said Judges shall hold his office for six years, as provided in this Constitution. As amended Aug. 11, 1891; proclamation Sept. 22, 1891.

Texas Rules of Civil Procedure, Rule 418

Rule 418. Briefs: Contents

The brief for appellant shall contain in the order here stated:

(a) A short, plain statement of the nature of the case without argument. A resume of the pleadings or evidence is seldom necessary and should be avoided.

(b) A statement of the points upon which the appeal is predicated, separately numbered in short form and without argument, and germane to one or more assignments of error when assignments are required. Such points will be sufficient if they direct the attention of the court to the error relied upon and they should ordinarily be so concisely stated that they may appear, separately numbered, on a single page of the brief. Assignments of error need not be copied in the brief, and may be cited by reference only.

(c) A brief of the argument, presenting separately or grouped, if germane, the points relied upon for reversal, the argument to include (i) a fair, condensed statement of the facts pertinent to such points, with reference to the pages in the record where the same may be found; and (ii) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. If complaint is made of any charge given or refused, such charge shall be set out in full. If complaint is made of the improper admission or rejection of evidence, the full substance of such evidence so admitted or rejected shall be set out with reference to the pages of the record where the same may be found. Repetition or prolixity of statement or argument must be avoided. As amended by order of March 31, 1941; order of Sept. 20, 1941, effective Dec. 31, 1941.

APPENDIX C

No. 99740

The Austin National Bank, Independent Executor v. Thomas D. Moorman, Adm., et al.	In The 98th District Court of Travis County, Texas

(Copied From Item [12])
(pp. 302-304)

AMENDED MOTION FOR NEW TRIAL OF THMOMAS D. MOORMAN, ADM., ET AL.

Defendants and cross-plaintiffs, Thomas D. Moorman, individually and as administrator of the Estate of Helen Mar Hunnicutt, George Moorman, Edwin Moorman, Frank W. Moorman, Harold M. Moorman, Catherine Moorman Wineland, joined by her husband, C. Wineland, Vernon Moorman, Wynant Moorman, Alma Mae Moorman Davis, joined by her husband, R. K. Davis, Fred Moorman, John D. Cofer, G. Hume Cofer, and R. C. Wilson, and, with leave of Court, file their Amended Motion For New Trial and move that the Court grant a new trial herein upon the following grounds, to wit:

1. There is no evidence to support the verdict of the jury, and the judgment of the Court.

2. The evidence is insufficient to support the verdict of the jury and the judgment of the Court.

3. The undisputed evidence shows that Helen Mar Hunnicutt, during her lifetime elected to exercise the option extended to her in the will of H. P. Hunnicutt, deceased.

4. The Court erred in overruling the Motion for Judgment, notwithstanding the verdict, filed by these defendants and cross-plaintiffs above, which Motion was filed upon the following grounds:

"I.

"1. The undisputed evidence in this case, which is a matter of law, and not of fact, establishes that Helen Mar Hunnicutt during her lifetime shortly after H. P. Hunnicutt's death and the probate of his will, when the executor extended to her the option provided in item five of the will, elected to accept said option so tendered.

"2. The overwhelming weight of the evidence establishes that Helen Mar Hunnicutt during her lifetime, when the option was extended to her by H. P. Hunnicutt's executor, elected to accept the option tendered in the will.

"3. The undisputed evidence as a matter of law shows that at all times after H. P. Hunnicutt's death and up to the date of her death on March 13, 1954, that she was able to perform said option agreement accepted by her, and able to pay the $8,000.00 consideration provided in the will.

"4. The undisputed evidence shows that the duly appointed administrator of Helen Mar Hunnicutt, deceased, within one year after the probate of the will of H. P. Hunnicutt on April 30th, 1954 tendered and paid to the executor the sum of $8,000.00 in accordance with the will and in performance of the election to accept the option made by Helen Mar Hunnicutt during her lifetime.

"5. The undisputed evidence of Bronson C. Turner, the trust officer of the Bank Executor, fully authorized

to act for the bank at all times between the death of H. P. Hunnicutt and Helen Mar Hunnicutt, and still a part-time agent and employee of the bank, is as follows:

"Q. If you have stated that during her lifetime that Helen Mar Hunnicutt discussed with you an option extended to her by the will of H. P. Hunnicutt, then state as well as you can how often you discussed this with her, and, as best as you recall, what was said."

"A. I remember discussing the option with her on two and possibly more occasions. Each time in the discussion she stated that she wished to exercise the option but that she did not have the available cash at that time."

"The construction of such language is a matter for the Court and not for the jury; i.e., if Helen Mar Hunnicutt had written a letter to the bank saying "I wish to exercise the option" and had added "I do not have the available cash at this time", and she had approximately a year to pay, and had the ability to pay, it would not be contended such letter was not an election to accept the option.

"6. Bronson C. Turner stated that at no time after such statement shortly after the probate of the will up until her death did he ever doubt her intention to accept the option in the will.

"7. Wayne Thode testified that, shortly after Helen Mar Hunnicutt's death Bronson C. Turner stated to him as follows:

"She told me she would take the property."

"Mr. Turner testified it was possible that he told Mr. Thode: "She (Helen) told me she would take the property, there was nothing more to do but pay the money."

"8. The testimony of Bronson C. Turner that Helen Mar Hunnicutt never definitely accepted the option, admitted over Moorman's objection, was a pure conclusion.

"9. There is no evidence to support the answer by the jury of "No" to the special issue submitted.

"10. The evidence is insufficient to support the jury's "No" answer to the issue submitted.

"11. The jury's answer to the issue submitted of "No" is contrary to the overwhelming weight of the evidence.

POINTS UPON WHICH THIS APPEAL IS PREDICATED

(From Appellants' Brief in the Court of Civil Appeals, Item 13, pp. 9-12)

FIRST POINT

There is no evidence to support the verdict of the jury; and the evidence is insufficient to support the verdict of the jury and judgment of the Court; and the undisputed evidence shows that Helen Mar Hunnicutt during her lifetime elected to exercise the option extended to her in the Will of Hicklin P. Hunnicutt, deceased; and the trial court should have sustained defendants' Motion for Instructed Verdict; and Motion Notwithstanding the Verdict.

SECOND POINT

The trial court should have granted appellants' Motion for Judgment, notwithstanding the verdict, upon the following grounds:

1. There is no evidence to support the verdict of the jury, and the judgment of the Court.

2. *The evidence is insufficient to support the verdict of the jury and the judgment of the Court.* (Emphasis added.)

3. The undisputed evidence shows that Helen Mar Hunnicutt, during her lifetime elected to exercise the option extended to her in the will of Hicklin P. Hunnicutt, deceased.

4. The Court erred in overruling the Motion for Judgment, notwithstanding the verdict, filed by these defendants and cross-plaintiffs above, which Motion was filed upon the following grounds:

1. The undisputed evidence in this case, which is a matter of law, and not of fact, establishes that Helen Mar Hunnicutt during her lifetime shortly after H. P. Hunnicutt's death and the probate of his will, when the executor extended to her the option provided in item five of the will, elected to accept said option so tendered.

2. *The overwhelming weight of the evidence establishes that Helen Mar Hunnicutt during her lifetime, when the option was extended to her by H. P. Hunnicutt's executor, elected to accept the option tendered in the will.* (Emphasis added.)

3. The undisputed evidence as a matter of law shows that at all times after H. P. Hunnicutt's death and up to the date of her death on March 13, 1954, that she was able to perform said option agreement accepted by her, and able to pay the $8,000.00 consideration provided in the will.

4. The undisputed evidence shows that the duly appointed administrator of Helen Mar Hunnicutt, deceased, within one year after the probate of the will of H. P. Hunnicutt on April 30th, 1954 tendered and paid to the executor the sum of $8,000.00 in accordance with

the will and in performance of the election to accept the option made by Helen Mar Hunnicutt during her lifetime.

5. The undisputed evidence of Bronson C. Turner, the trust officer of the Bank Executor, fully authorized to act for the bank at all times between the death of H. P. Hunnicutt and Helen Mar Hunnicutt, and still a part-time agent and employee of the bank, is as follows:

"Q. If you have stated that during her lifetime that Helen Mar Hunnicutt discussed with you an option extended to her by the will of H. P. Hunnicutt, then state as well as you can how often you discussed this with her, and, as best as you recall, what was said."

"A. I remember discussing the option with her on two or more occasions. Each time in the discussion she stated that she wished to exercise the option but that she did not have the available cash at that time."

The construction of such language is a matter for the Court and not for the jury; i.e., if Helen Mar Hunnicutt had written a letter to the bank saying "I wish to exercise the option" and had added "I do not have the available cash at this time", and she had approximately a year to pay, and had the ability to pay, it would not be contended such letter was not an election to accept the option.

6. Bronson C. Turner stated that at no time after such statement shortly after the probate of the will up until her death did he ever doubt her intention to accept the option in the will.

7. Wayne Thode testified that, shortly after Helen Mar Hunnicutt's death Bronson C. Turner stated to him as follows:

"She told me she would take the property."

"Mr. Turner testified it was possible that he told Mr. Thode:

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8. The testimony of Bronson C. Turner that Helen Mar Hunnicutt never definitely accepted the option, admitted over Moorman's objection, was a pure conclusion.

9. There is no evidence to support the answer by the jury of "No" to the special issue submitted.

10. The evidence is insufficient to support the jury's "No" answer to the issue submitted.

11. The jury's answer to the issue submitted of "No" is contrary to the overwhelming weight of the evidence.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO. 628

THOMAS D. MOORMAN, Administrator of the Estate of Helen Mar Hunnicutt, deceased, et al.,
Petitioners

v.

THE AUSTIN PRESBYTERIAN THEOLOGICAL SEMINARY, et al.,
Respondents

On Petition for Writ of Certiorari to the Supreme Court of Texas

MEMORANDUM BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Question Presented

As best Respondents are able to determine, the question presented for review is whether the determination by the Supreme Court of Texas that Petitioners had no point in their brief in the Texas Court of Civil Appeals invoking the jurisdiction of that court to determine whether the finding of the jury was contrary to the overwhelming weight and preponderance of the evidence constituted a "false, unreasonable, discriminatory, and arbitrary treatment of the record" and

denied Petitioners the equal protection of the laws or deprived them of property without due process of law.

Statement of the Case

Petitioners' statement of the case is accurate except that it misstates the holding of the Texas Court of Civil Appeals. Petitioners state at Pages 4 and 6 of their application that the Court of Civil Appeals held the evidence at trial was insufficient to support the verdict of the jury and that such verdict was contrary to the great weight of the evidence (a question of fact under Texas law). Actually, there is nothing in the opinion of the Court of Civil Appeals to indicate that it thought Petitioners raised this question. That Court carefully limited its holding to the question of conclusive evidence or no evidence (a question of law in Texas) and showed an awareness that Petitioners' points of error in that Court were procedurally incapable of presenting the fact question on the evidence. See the portions of the Court of Civil Appeals' opinion appearing at Pages 35 and 38 of Petitioners' application as Appendix A.

Argument

1. There is no merit in Petitioners' application because the Supreme Court of Texas decided this case correctly and applied established state law in so doing. Petitioners simply failed to raise by point of error in the Court of Civil Appeals and thereby irrevocably waived any possible complaint on the fact question of the great weight or sufficiency of the evidence at trial. Petitioners' only complaints in the Court of Civil Appeals were of rulings by the trial court at stages where the question of the sufficiency or great weight of the evidence is not procedurally relevant and cannot be raised. For a case directly in point, see *McDonald vs.*

New York Central Mutual Fire Insurance Company, 380 SW 2d 545 (Tex. Sup. 1964). See also the very lucid article by then Associate Justice and now Chief Justice Robert W. Calvert entitled *"No Evidence" and "Insufficient Evidence" Points of Error,* at 38 Tex. Law Rev. 361 (1960).

2. Petitioners' application lacks merit because even if it be assumed, *arguendo,* that the Supreme Court of Texas misapplied its appellate rules regarding the proper method of presentation of points on appeal, its misapplication involves only local or state law and presents no federal question. A familiar limitation upon this Court's authority is that it respects the power and privilege of "each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise." *John vs. Paullin,* 231 US 583, 585 (1913) and numerous cases therein cited. The exercise of this power by a state court is not subject to review. Especially is this true where there is no suggestion that the state court has acted to evade a constitutional issue. *Nickel vs. Cole,* 256 US 222 (1921), Opinion of the Court by Mr. Justice Holmes. There certainly is no such suggestion in the instant case. The *John* and *Nickel* cases are reaffirmed and pertinent language therefrom quoted by the Court with approval in *Wolfe vs. State of North Carolina,* 364 US 177, 195 (1960).

3. Respondents would point out in addition that the constitutional question or theory raised by Petitioners was not adequately presented for decision to the Texas Supreme Court as required. The attention devoted by Petitioners in that Court to their claimed federal question consisted of roughly one-half page in their Motion for Rehearing which does not appear to include all

that Petitioners now argue. This scant treatment indicates how little regard Petitioners themselves have for the merits of their "federal question." This treatment also failed utterly to explain the question with requisite clarity. Petitioners did not raise the question appropriately below and it is thus not available to them here.

Conclusion

For the foregoing reasons, Respondents pray that Petitioners' application for writ of certiorari be denied.

Respectfully submitted,

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